IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-357

LARRY DALE PATTY

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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September 6, 1977

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner Larry Dale Patty respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Virginia Supreme Court entered in this case on June 10, 1977.

OPINIONS BELOW

The Opinion of the Supreme Court of Virginia from which this review is sought is reported as Record No. 761249 of the Supreme Court of Virginia and is printed in the Appendix, *infra*, pp. A1-A10.

The ruling of thePrince William County Circuit Court from which the appeal to the Supreme Court of Virginia was taken is not reported and appears in the Appendix, *infra*, p. A-23.

JURISDICTION

The Opinion of the Supreme Court of Virginia was first rendered on June 10, 1977. The Opinion is re-printed in the Appendix, *infra*, pp. A1-A10, and is presently reported as Record No. 761249 of the Supreme Court of Virginia. This Petition for a Writ of Certiorari was filed within ninety (90) days from that date. Petitioner respectfully prays that this Court exercise the discretion vested in it under 28 USC §1257(3) and grant the Writ of Certiorari.

QUESTION PRESENTED

I. Whether the admission into evidence of the contents of a locked trunk of an automobile violated Petitioner's rights under the Fourth and Fourteenth amendment to the United States Constitution where the uncontradicted evidence was that:

a) The automobile had been disabled nearly five hours prior to the Petitioner's arrival;

b) The police on the scene knew that the automobile was disabled;

c) No attempt was ever made by the police to get a search warrant;

d) A sufficient number of police were present at the scene during the five hour period; and

e) The police knew in advance that they were going to search the automobile and were going to let no one remove it.

CONSTITUTIONAL PROVISIONS

The following provisions of the Constitution of the United States are involved:

> AMENDMENT IV: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> AMENDMENT XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person's, life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Prince William County Police Department received a telephone call sometime between 2:00 and 2:30 P.M. on February 11, 1975, with Investigator Fisher arriving at the scene of the crime at approximately 3:00 o'clock in the afternoon, the same time that Sergeant Russell and Investigator Bennett of the Prince William County Police Department commenced a stake-out of the automobile involved in this case T.M. 6, see Appendix, pp. A 19). There were approximately seven police officers in the stake-out and the police had been informed that somebody would pick up the car between 4:00 and 5:00 that same afternoon (T.M. 6, see Appendix, pp. A19). The police arrived pursuant to a tip that marijuana was seen in the locked trunk of the automobile but none of the police ever saw the marijuana prior to the arrest of the Petitioner. After approximately five hours of the police stake-out the Petitioner and others arrived at the scene of the crime, and the Petitioner and one other young man walked over toward the

automobile. Petitioner appeared to be attempting to start the automobile, when a pre-arranged signal was given and the police moved in and arrested all persons at the scene of the crime (T.T. 40, 41, see Appendix pp. A21,A22). The automobile containing the marijuana was physically disabled by a gas station attendant at approximately 3:30 P.M. on the day in question (T.T. 19, see Appendix pp. A23), and the fact of that disability was known by the police at the scene of the crime (T.T. 48, see Appendix pp. A22). The police had several discussions on whether or not to get a search warrant (T.M. 27, see Appendix pp. A20, A21), and could have gotten a search warrant in as little time as one hour (T.M. 23, see Appendix pp. A19, A20), but absolutely no effort was made to obtain a search warrant and, instead, the trunk was pried open with two crow-bars when none of the keys which were found on the Petitioner's person fit the locked trunk. The automobile was found by the gas station personnel at the scene of the crime with all doors locked and no keys were left with the gas station personnel. The sole time that the marijuana was seen by anyone was when the trunk lid of the automobile "popped open" for a total viewing time of approximately thirteen seconds. The gas station where the automobile was found was not public property but was private property which was open to the public for the purpose of automobile repair and servicing of automobiles.

Petitioner was indicted by the Grand Jury on June 2, 1975. A Motion to Suppress the Evidence based on the ground of an invalid search was heard on September 17, 1975, by the Circuit Court of Prince William County, said Motion being denied. (T.M. 58, see Appendix pp. A16). On September 22, 1975, the Court, sitting without a jury, heard all the evidence on the charge of possession with intent to distribute the marijuana and convicted the Petitioner, Larry Dale Patty, of that offense. A Motion to Set Aside the Verdict was filed by the Petitioner after the said finding of guilty by the trial court; the motion addressing itself, in part, to the failure of the police to get a search warrant to search the locked trunk of the disabled automobile. The Motion to Set Aside the Verdict was heard on May 25, 1976, the same date as the date set for sentencing, the said Motion being denied, and the Petitioner was sentenced to seven years in the State

Penitentiary with five of the years suspended (T.S. 22, 23, 30, see Appendix pp. A18, A23). The trial court decision was appealed by filing a Notice of Appeal and Assignments of Error on June 9, 1976, alleging, among other things, the failure of the police to have obtained a search warrant prior to conducting a search of the automobile's locked trunk (see Appendix pp. A13, A14). The Petition for a Writ of Error alleging the said illegal search was filed with the Supreme Court of Virginia on September 23, 1976, and the Writ of Error was awarded the Petitioner on January 7, 1977 by the Supreme Court of Virginia. The case was orally argued before the Supreme Court of Appeals of Virginia on April 19, 1977, and the decision of the Supreme Court of Virginia denying the appeal of the Petitioner was entered on June 10, 1977, the Court noting that "there is no error in the judgment complained of" (see Appendix pp. A11). The Notice of Appeal pursuant to Rule 10 and Rule 33 of the Rules of the Supreme Court of the United States was filed with the Clerk of the Supreme Court of Virginia on September 6, 1977.

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant the Writ of Certiorari Because the Decision Below Resolved a Federal Question of Constitutional Significance in a Matter Not in Accord With the Applicable Decisions of This Court.

In the Court below, Petitioner relied on this Court's decision in *Coolidge v. New Hampshire*, 403 US 433 and *Cardwell v. Lewis*, 417 US 583, in asserting that the Fourth Amendment's proscription against unreasonable searches and seizures, extended to the States by virtue of the Fourteenth Amendment, applied in the Petitioner's case because it involved an unoccupied, parked, disabled automobile on private property open to the public. The Virginia Supreme Court held that even though the automobile "was momentarily inoperable because the ignition coil had been withdrawn and the car was not susceptible to immediate removal from the service station lot", that there were still enough "exigent circumstances" present so as not to require the police to first obtain a search warrant prior to

searching the contents of the locked trunk of the automobile. This decision is in direct conflict with the cases of *Cardwell v. Lewis*, 417 US 583 and *Coolidge v. New Hampshire* 403 US 433. In *Coolidge*, the Court noted "thus the most basic constitutional rule in this area is that searches conducted outside of the judicial process, without prior approval by Judge or Magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions. The exceptions are 'jealously and carefully drawn' and, there must be a showing by those who seek the exemption . . . that the exigencies of the situation make that course imperative. The burden is on those seeking the exemption to show the need for it". Further, as in *Coolidge*, the search could not be called a search incident to a valid arrest. The Court noted in *Coolidge* that they had addressed this very point (search incident to an arrest) in *Chimel v. California*, 395 US 752, where the Court stated that a search incident to an arrest can extend only to "the arrestee's person and the area within his immediate control-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.". Truly, the locked trunk of an automobile, which could only be opened forcibly by two police officers, with two crowbars is not such an area. It is important to note that the automobile had been seized by the police even though they had not yet towed it off. This is obvious from Sgt. Russell's testimony (T.M. 39, see Appendix pp. A21) where he testified that the police were not going to let anyone drive off in the automobile. Therefore, the automobile had been seized from the time the stake-out had commenced at approximately 3:00 P.M., five (5) hours before the Petitioner had arrived at the scene of the crime. Again, in *Coolidge* (at p. 478), an analogy can be made to the case at bar where the Court stated that "since the police knew of the presence of the automobile and planned all along to seize it, there was no 'exigent circumstance' to justify their failure to obtain a warrant. This application of the basic rule of the Fourth Amendment law, therefore, requires that the fruits of the warrantless seizure be suppressed". And, with approximately seven (7) policemen in the nearby area, one of the policemen could certainly have been sent for a search warrant, which could have taken as little as one (1) hour to obtain.

In *Cardwell v. Lewis*, 417 US 583, the Court again affirmed the principle that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears". The Court then commented on its holding in *Carroll v. United States*, 267 US 132, noting "that a *moving* automobile on the open road presents a situation where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought", and "where there is no reasonable likelihood that the automobile could or would be moved, the *Carroll* doctrine is simply inapplicable". Furthermore, in *Cardwell*, two other factors distinguished the warrantless search from the case at bar, namely, that the car in question in *Cardwell* was readily movable and could be driven away by either the Defendant, members of the Defendant's family or the Defendant's attorney, and also that "the automobile's owner is alerted to police attention and, as a consequence, the motivation to remove evidence from the official grasp is heightened". In the case at bar, no one knew of the police stakeout and, as stated earlier, the vehicle was seized by the police at the time of the stakeout, because the police were going to allow no one to move it. One further and very important point should also be noted in *Cardwell* and that was that the search of the automobile was related only to *exterior* paint scrapings and a tire molding, on a car which was parked in a *public* parking lot. In the case at bar, the automobile's interior was searched and the automobile was on private property which was open to the public for limited purposes. The Court, in *Cardwell*, noted that "we are not confronted with any issue as to the propriety of a search of the car's interior", noting "neither *Carroll, supra*, or other cases in this Court require or suggest that in every conceivable circumstance the search of an automobile even with probable cause may be made without the extra protection for privacy that a warrant affords". (Citing *Chambers*, supra).

The Supreme Court of Virginia noted that the wiser course for the police would have been to acquire a search warrant, pointing out that the important factor in the case was that the police were dealing with contraband goods concealed and about to be illegally transported again in the automobile and they knew it. The Court below even cited, among other cases, the *Cardwell*

case, supra, yet quoted the holding of a Fifth Circuit case in support of their opinion, namely, *United States v. Mitchell*, 538 F. 2d 1230, (5th Cir. 1976). While *Mitchell* contains several of the factors that the case at bar contains, the one factor that the Supreme Court of Virginia had trouble with was the fact that the ignition coil had been withdrawn and the car was not suscepible to immediate removal. The Court then conjectured that the condition was only temporary and further divined that the contraband had a "street value" in the hundreds to thousands of dollars, a fact revealed no where in any part of the record or argument of counsel. The Court then went on to say that a second car containing more of the Defendant's companions, one of whom *may* have had a key to the automobile and a key to the locked trunk which *might* have had deadly weapons hidden under the contraband and, therefore, "for the safety of themselves, and the public, sound judgment mandated an immediate search by the officers"; none of the foregoing facts could be found anywhere in the record.

The exclusionary rule, as applied to automobiles, has been the subject of many cases before this Honorable Court, yet none have involved a disabled automobile. In *Texas v. White*, 15 CRL 2395, 521 W.W. 2d 255, the United States Supreme Court reversed the Texas Court of Appeals which had found no exigent circumstances existing and suppressed the fruits of a search. The *White* decision was *per curiam* and was critized by at least one member of this Honorable Court as not having been fully aired. Consequently, it is of manifest importance to all individuals currently charged with crimes which involve the search of an automobile without a warrant to have this Honorable Court grant the Writ and issue a definitive statement to further clarify the troubled area of the exclusionary rule as applied to automobile searches. It must be shown that some right to privacy exists when an automobile is involved, even when the police have probable cause to search, otherwise the police will never seek a search warrant prior to conducting an automobile search.

2. The Court should Grant the Writ of Certiorari Because the Decision Below Raised Significant Recurring Problems and Important Factual Issues Regarding the Necessity of Obtaining a Search Warrant Prior to Searching an Automobile, Assuming Probable Cause to Search the Automobile Exists.

As stated earlier, the exclusionary rule has been the subject of much discussion, and is still the source of considerable confusion. After the Court's decision in *Coolidge v. New Hampshire*, 403 US 433 and *Cardwell v. Lewis*, 417 US 583, the Supreme Court of Virginia, in the case at bar, should have ruled that the police should have first obtained a search warrant prior to conducting a search of the locked trunk of the immobile automobile. Here the police came upon a parked, unoccupied, initially locked, later immobilized automobile which they suspected contained a large amount of marijuana. The suspected marijuana was found in a locked trunk that no one could open without the use of crow-bars. The "inventory search" rationale of *Cooper v. California*, 386 US 58 certainly does not apply, the Court noting that *Cooper* "certainly should not be read as holding that the police can do without a warrant at the police station what they are forbidden to do without a warrant at the place of seizure". The Court went on to say, in *Cooper* (at page 470), "but where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none that is Constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances". The immobilized car was going nowhere, and, as stated earlier, the police had already technically seized the automobile. Yet, even with these facts admitted by the Commonwealth, the Supreme Court of Virginia attempted to justify the search without a warrant as being necessary for the protection of the police officers and the public.

Without this Honorable Court's guidance in the difficult areas of the Fourth and Fourteenth Amendments, conservative opinions by courts such as the Virginia Supreme Court tend to give police more and more authority to search automobiles without a warrant, given only probable cause to conduct the

search. The United States Constitution assumes that searches conducted outside the judicial process are "per se unreasonable" and these conservative opinions fly in the face of this basic constitutional principle. Consequently, it is of manifest importance that some limitations be placed on the police's right to search automobiles or the police will never get a search warrant when an automobile search is involved. The right to privacy of persons in their automobiles must be shown to exist or the Fourth and the Fourteenth Amendments will have no applicability to automobiles.

CONCLUSION

The case against Larry Dale Patty rested exclusively on the question of whether or not a search warrant should have been obtained prior to conducting a search of the locked trunk of an immobilized automobile. It is readily apparent that this is a case of neither harmless error, nor one involving a mere "technicality" of criminal procedures; it is the case of a man who has been convicted of a felony offense because illegally obtained evidence was introduced against him in violation of the Constitution of the United States of America. For this, and the reasons stated above, the Petitioner, Larry Dale Patty, respectfully prays that this Court grant a Writ of Certiorari to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 1977 three copies of the Petition for Writ of Certiorari was served upon Respondent by depositing the same in the United States Mail, first class, postage prepaid, in envelopes addressed to the Honorable Anthony F. Troy, Attorney General, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia 23219 and to Paul Ebert, Commonwealth Attorney, 9304 Peabody Street, Manassas, Virginia 22110. I further certify that all parties required to be served have been served, pursuant to Rule 33 of the Rules of the Supreme Court of the United States.

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APPENDIX

SUPREME COURT OF VIRGINIA

Rendered: June 10, 1977

Record No. 761249

LARRY DALE PATTY

Petitioner

v

COMMONWEALTH OF VIRGINIA

Respondent

OPINION OF THE COURT
BY JUSTICE A. CHRISTIAN COMPTON

FROM THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY
Burch Millsap, Judge

Indicted for possession of marijuana with intent to distribute, defendant Larry Dale Patty was tried by the court without a jury, found guilty, and, by order of May 25, 1976, sentenced to seven years' imprisonment, with execution of five years suspended.

The issues on appeal are: (1) Was there probable cause for defendant's arrest? (2) Was the search of the motor vehicle in which the marijuana was found constitutional? (3) Was the testimony sufficient to identify the substance seized as marijuana? (4) Was the evidence sufficient to support the finding that defendant was in possession of the contraband with the intent to distribute it?

The facts are not in material dispute. Upon arriving at his place of business near 6:00 a.m. on February 11, 1975, Harold Green, the operator of the Gainesville Mobil Service Center in Prince William County, found unattended on the parking lot a disabled locked Pontiac automobile bearing Texas license plates.

Shortly after 7:00 a.m. on that day, Green received a telephone request from an anonymous male caller to repair the vehicle. No keys were left with the car, so in the process of working on it the doors were unlocked by use of a coat hanger. The repairs to a wheel bearing, a wheel cylinder and brake shoes were completed about 2:00 p.m. and, as the rear of the car was being lowered to the ground from its position on a bumper jack, "the trunk lid flew up." The compartment remained open for about 13 seconds before Green shut the lid. During this time, Green and at least two employees of the station, Green's son and Jacob Hecht, saw in the trunk what appeared to be marijuana.

The county police were called and about 3:00 p.m. Officer James R. Fisher, a narcotics investigator, arrived at the service station and questioned the informants about the contents of the trunk. To support his identification of the substance, Green's son told Fisher he had previously seen marijuana during a high school lecture on the subject; he, along with his father and Hecht, described in detail the characteristics of what they had seen. They indicated that it was plant material, that it was "brownish-green", that seeds were visible, and they described how it was packaged. The son drew for the officer a sketch of the seeds to aid the description.

Having been advised that the anonymous caller indicated the car was to be claimed between 4:00 and 5:00 p.m., the police decided about 3:30 p.m. not to approach the car for fear those in control of it "might come back and see us there and abandon the car". By about 5:00 p.m. additional officers had been called to the area and were in place to await the unknown person or persons who would come for the vehicle.

As security for payment of the bill before the car left the station, Green's son removed the ignition coil about 3:30 p.m.; this fact was known to the police, but the record is unclear when it was learned.

The police continued to wait in the area. Only two officers were actually on the station premises; Fisher was inside the station; the other officer waited in a car "alongside" the station.

At approximately 8:10 p.m. a station wagon bearing Maryland license plates pulled to the station gas pumps. The vehicle was occupied by the defendant, four other adults and a child. The defendant and another occupant, Butch Carroll, went to the Pontiac. Defendant entered the vehicle by the left front door, which was still unlocked, and positioned himself behind the steering wheel. Carroll stood between the opened door and the body of the car. While defendant attempted to start the car using an ignition key in his possession, the police moved on a prearranged signal and arrested without a warrant the defendant and his companies.

The trunk of the Pontiac was then pried open by the police, no key to the trunk having been found in defendant's possession. A search warrant had not been obtained. Recovered by the officers from the trunk was over 450 pounds of marijuana contained in about 175 packages, made of brown paper and transparent, as well as opaque, plastic. The photographs taken at the time and received in evidence show that two of the packages had been broken open, exposing the substance they contained.

Defendant argues there was no probable cause for his arrest, presumably implying the trial court erred in refusing to suppress the marijuana seized from the car. Specifically, defendant contends that the arrest was made solely on the "hearsay" information received by Fisher from "unreliable informants." He urges also the informers only had a glimpse of the contents of the open trunk before it was closed. This brief observation, he says, coupled with the fact that most of the plant material was concealed in packages, prevented the informers, even if they were reliable, from reaching a trustworthy conclusion as to the contents of the trunk. There is no merit to this contention.

In the first place, the information related to Fisher, as the Attorney General points out, came from *named* citizens who were not the typical paid police informants. As we said in *Guzewicz* v. *Commonwealth*, 212 Va. 730, 735, 187 S.E.2d 144, 148 (1972):

> "Public-spirited citizens should be encouraged to furnish to the police information of crimes.

> Accordingly, we will not apply to citizen informers the same standard of reliability as is applicable when police act on trips from professional informers or those who seek immunity for themselves. . . ."

See Simmons v. *Commonwealth*, 217 Va. 552, 555, 231 S.E.2d 218, 221 (1977). Secondly, the record shows that at least two of the citizen informers made their identifications based on prior personal experience with marijuana; Hecht testified he had seen it on "numerous" occasions and Green, Jr. had seen had been instructed about the substance during a high school lecture. While there is no requirement that a known reliable informant demonstrate the basis for his conclusion that the substance he observed was narcotic, *Wheeler* v. *Commonwealth*, 217 Va. 95, 98, 225 S.E.2d 400, 403 (1976), the informants here spoke from experience and not from mere supposition. Finally, there is nothing inherently unreliable about an identification based on a 13-second examination of material arrayed openly and in transparent packages, as the marijuana was in this case.

Consequently, the information obtained from the three citizens, coupled with Fisher's personal observation of defendant's conduct in asserting control over the Pontiac, justified Patty's warrantless arrest; the officer had probable cause to believe a felony had been or was being committed by defendant. *See McKoy* v. *Commonwealth*, 212 Va. 224, 183 S.E.2d 153 (1971).

Defendant next argues the warrantless search of the locked trunk of the vehicle was unreasonable and hence unlawful. Recognizing the automobile-exigent circumstances exception to the warrant requirement, defendant says no urgency prevailed in this case to justify the failure of the police to acquire a warrant to search. Defendant contends there was adequate time to obtain a warrant between 3:00 p.m., when the police arrived at the scene, and the time of defendant's arrest five hours later. Pointing to the testimony of one of the officers who stated there was "no way" anyone would be allowed to "drive off in the car" after the "stake out" was established, defendant also argues the search was planned because actually, he says, the car was "seized", without

being towed away, hours before defendant was arrested. Moreover, he urges, the police knew the car would not start because, near 3:30 p.m., the ignition coil had been removed. Patty also contends "at least seven police officers" were involved in watching the station premises and it was therefore unreasonable not to send one of the officers on the scene to obtain a warrant while the others maintained the "stake out."

While we agree the wider course for the police would have been to acquire a search warrant, it does not necessarily follow that under these circumstances the failure to obtain one requires suppression of the evidence seized. The important factor here is that the police were dealing with contraband goods concealed and about to be illegally transported again in the automobile, and they knew it. The defendant's arguments on this phase of the case have been precluded by *Chambers* v. *Maroney*, 399 U.S. 42 (1970) and *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), as explicated in *United States* v. *Mitchell*, 538 F.2d 1230 (5th Cir. 1976), *cert. denied* 20 Crim. L. Rep. 4202, a case strikingly similar to the case at bar. *See Carroll* v. *United States*, 267 U.S. 132 (1925); *United States* v. *Soriano*, 497 F.2d 147 (5h Cir. 1974). *See generally Cady* v. *Dombrowski*, 413 U.S. 433 (1973); *Schaum* v. *Commonwealth*, 215 Va. 498, 501, 211 S.E.2d 73, 75 (1975).

In *Mitchell*, defendant appealed his conviction for possessing marijuana with intent to distribute. The sole issue was the constitutional validity of a warrantless search on a motel parking lot of a motor vehicle in which defendant was apprehended and in which the substance was discovered. In 1973, federal drug enforcement officials were informed by one Mancuso of a plan to smuggle marijuana by motor vehicle from Mexico to San Antonio, Texas Mancuso advised the officials that he had been employed to pick up the truck, which he accurately described in great detail, in Mexico on a certain day, cross the border at a given time and leave it on a specific motel parking lot in San Antonio. This he did and, as instructed by his employer, locked the vehicle, disposed of the keys and left the scene. At least ten government agents had established a "stake out" at the parking lot.

Shortly after Mancuso left the area, defendant entered the truck cab. Defendant, who had followed Mancuso from Mexico in a separate vehicle at a discreet distance, had been under continuous surveillance by federal agents for seven hours, from the time Mancuso and defendant crossed the border. As defendant was preparing to drive the truck out of the parking lot, the agents arrested him. Initially unable to locate any contraband in the vehicle, the agents finally, upon prying up a camper body from the truck bed, found 400 pounds of marijuana hidden in the space under the camper floor. No warrants were obtained authorizing any of these actions.

The Fifth Circuit Court of Appeals, sitting *en banc*, reversed an earlier panel decision reported in 525 F.2d 1275, and held constitutionally valid the warrantless search of the truck. There, as here, probable cause to support the search existed. There, as here, defendant argued that by the time of the search the vehicle "had been immobilized, exigence had passed, and a warrant could have been obtained at leisure." 538 F.2d at 1232. As here, the defendant in *Mitchell*, in support of his argument for want of exigence, contended the search was deliberately planned because ample time had passed after probable cause had arisen for procuring a warrant, yet none was sought. But the *Mitchell* court, citing *Cardwell*, rejected this argument. In *Cardwell*, defendant's car was seized on a public commercial parking lot. The Supreme Court stated:

> "Respondent contends that here, unlike *Chambers*, probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances. Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. Cf. *Chambers*, *id.*, at 50-51. The exigency may

> arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action." 417 U.S. at 595-96; 538 F.2d at 1233.

Most of the circumstances present in *Mitchell* likewise prevail here. We have (a) a motor vehicle which is (b) loaded with contraband seized (c) on private property open to the public; there was (d) the existence of probable cause to search after (e) a lengthy surveillance. The only significant fact favorable to defendant present here and not present in *Mitchell* is that here the Pontiac was momentarily inoperable because the ignition coil had been withdrawn and the car was not susceptible to immediate removal from the sevice station lot. But this condition was only temporary. When the car was seized, the trunk searched and the contraband seized, the police then, as during the preceding five hours, had no idea when or how many persons would arrive on the scene to claim the vehicle and its cargo. It would be naive for experienced officers to assume that five adults would be the only ones interested in obtaining this contraband, presumably having "street value" in the hundreds of thousands of dollars. Another car loaded with more of defendant's companions, one of whom may have had another key to the Pontiac's ignition, could have arrived at any time, paid the repair bill, required Green to replace the ignition coil and driven the load of marijuana away. In addition, the police could have anticipated that deadly weapons, not visible to the informers, were hidden under the contraband in the trunk. One of the group in custody may have had a key to the trunk affording ready access to the weapons. For the safety of themselves, and the public, sound judgment mandated an immediate search by the officers.

Accordingly, prompt action to search for and seize the contraband at the time of defendant's arrest was dictated by the exigencies of the situation and the police acted reasonably in so doing. *See United States* v. *McClain*, 531 F.2d 431 (9th Cir.),

cert. denied 97 S.Ct. 102 (1976). *See also Westcott* v. *Commonwealth*, 216 Va. 123, 125-26, 216 S.E.2d 60, 63 (1975).*

The record does not support defendant's third contention that the Commonwealth's expert witness, a chemist, did not personally perform the testing of the substance in question and hence was unqualified to identify it at trial. A fair reading of the evidence shows the expert conducted a chemical analysis of the material, assisted by a "new chemist", and made a microscopic examination of samples of the substance. Consequently, we find no error in admitting the chemist's testimony.

Finally, defendant argues the evidence was insufficient to convict him of possession of the substance with the intent to distribute it. In defendant's possession when arrested was a motor vehicle parking lot ticket issued at a Texas airport and stamped 6:33 p.m. on the day before the arrest. Richard Schminsky another occupant of the station wagon, the only witness testifying for the defense, stated he met defendant in Baltimore about 12:00 noon on the day of the arrest. From these facts defendant argues that "the only reasonable conclusion is that the Defendant caught a plane from Texas to Baltimore, Maryland, the night of February 10, 1975, making it impossible for the Defendant to have driven the car to the Mobil Gas Station in Gainesville, Virginia because of the great distance involved". Defendant further argues that "[a]ssuming, but not admitting, that Larry Patty did own the automobile," the effect of the trial court's holding is "that if someone loans his car to a friend and that friend carries hidden contraband in that car, and, the said car then breaks down and the owner shows up to pay for the disabled car, then that owner can be charged and convicted of the

*Because of what we have just said, it is unnecessary for us to consider an alternative theory advocated by the Attorney General to sustain the warrantless search. That argument is based on Code § 18.2-249, permitting seizure and eventual forfeiture of a motor vehicle used in connection with the illegal distribution of controlled substances. That statute incorporates by reference Code § 4-56, which requires a search warrant for the search of such a vehicle. *See One 1963 Chevrolet Pickup Truck* v. *Commonwealth*, 208 Va. 506, 158 S.E.2d 755 (1968). *See also Cooper* v. *California*, 386 U.S. 58 (1967).

constructive possession of any contraband materials found hidden in a closed trunk." These contentions, likewise, are without merit.

We think the evidence establishes beyond a reasonable doubt that defendant had constructive possession of the marijuana in question; because the substance was subject to his dominion or control. *Ritter* v. *Commonwealth*, 210 Va. 732, 741, 173 S.E.2d 799, 805-06 (1970). *See Adkins* v. *Commonwealth*, 217 Va. 437, 229 S.E.2d 869 (1976); *Fox* v. *Commonwealth*, 213 Va. 97, 189 S.E.2d 367 (1972). We also believe the evidence fully supports the trial court's finding that such possession was with the intent to distribute, when the quantity of the contraband present in the vehicle is considered with all the other circumstances of the case. *Hunter* v. *Commonwealth*, 213 Va. 569, 193 S.E.2d 779 (1973).

For the sake of completeness, we recount the final leg of defendant's trip to the scene. Schminsky testified that during the day of defendant's arrest he met Patty and one Hill in "early afternoon" at a bar in Baltimore; that later in the day, upon Hill's request, Schminsky agreed to drive Hill "down to pick up a friend's car"; that during "that evening" he drove Hill and Patty to a motel in Manassas where Butch Carroll and an adult female and a child joined the group to go "to the gas station"; and that the arrest took place upon their arrival there.

Subsequent to Patty's arrest, the police found in the glove compartment of the Pontiac defendant's birth certificate and a 1973 bill of sale for the car showing "purchaser's name" to be "Larry Patty." Removed from defendant's wallet, which was on his person when arrested was a large piece of folded paper containing numerous handwritten calculations.

As a part of his sufficiency of the evidence argument, defendant contends the birth certificate and the bill of sale, received in evidence over his objection, were inadmissible hearsay. These items were not offered for the truth of the matters stated therein but merely to link the defendant with the vehicle and hence were not hearsay. But more importantly, no error was

assigned specifically raising that issue so we will not now notice such alleged error. Rule 5:21 (formerly Rule 5:7). Defendant also maintains that the paper containing calculations removed from his wallet was never actually received as an exhibit and thus should not be considered as evidence; an examination of that exhibit, a part of the record on appeal, shows that it was, in fact, properly admitted in evidence and initialed by the trial judge.

As we have said, the evidence was sufficient to convict. When defendant was arrested, he was in possession and control of the Pontiac; he was behind the steering wheel with the ignition key in his hand, attempting to start the car. A birth certificate and a bill of sale, both carrying defendant's name, were in the vehicle. Certain computations on the piece of paper found in defendant's wallet appear to relate to conversion of grams to pounds, typical measurements in the distribution of drugs, in amounts approximating the quantity of contraband found in the car. From these facts the trial court could infer defendant intentionally and consciously possessed the marijuana found in the trunk of the automobile with the intent to distribute it.

The judgment of conviction will, accordingly, be

Affirmed.

Attorney for Appellant:
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SUPREME COURT OF VIRGINIA

Judgment Order

Dated June 10, 1977

VIRGINIA

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY THE 10th DAY OF JUNE, 1977

LARRY DALE PATTY,
Plaintiff in Error

against

COMMONWEALTH OF VIRGINIA
Defendant in Error

Upon a writ of error to a judgment rendered by the Circuit Court of Prince William County on the 25th day of May, 1976.

This day came as well the Plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the Court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel,is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the Plaintiff in Error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said Circuit Court.

A Copy,

Teste:

/s/ HOWARD G. TURNER
Clerk

Defendant in Error's costs:

Attorney's Fee	$ 50.00
Printing Brief	$ 88.00
	$138.00

Teste:

Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

CRIMINAL NO. 5887

COMMONWEALTH OF VIRGINIA

vs

LARRY DALE PATTY

NOTICE OF APPEAL

Counsel for LARRY DALE PATTY in the above-styled cause hereby gives notice of an Appeal from the Judgment and Decree entered against him in the above-captioned cause, on the 25th day of May, 1976, in the Circuit Court of Prince William County.

ASSIGNMENTS OF ERROR

The said LARRY DALE PATTY, Defendant in the above-styled cause will apply to the Supreme Court of Virginia for a Writ of Error to reverse the said Judgment and Decree entered on the 25th day of May, 1976, and hereafter sets forth the assignments of error, as follows:

1. The Court erred in finding that the police officers on the scene had probable cause to arrest the Defendant on the charge of possession with intent to distribute marijuana.

2. The Court erred in denying Defendant's Motion to Suppress the Evidence in that:

a) The police should have obtained a search warrant prior to their search of the car.

b) The Commonwealth's expert witness did not adequately identify the plant material as marijuana.

3. The Court erred in finding the Defendant guilty of possession with intent to distribute marijuana based on the evidence it had before it in that:

a) The evidence was insufficient to support the fact that the Defendant constructively possessed the marijuana found and, in fact, the evidence tended to show that the marijuana found belonged to another party.

b) The presumption of innocence of the Defendant was never overcome by the Commonwealth's evidence.

Transcript, Statement of Facts, and other incidents of the case which have not yet been filed with this Court shall hereafter be filed.

LARRY DALE PATTY

LARRY DALE PATTY

APPELLANT'S MOTION TO SUPPRESS EVIDENCE

DENIED 9-17-75

VIRGINIA:
IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CRIMINAL NO._____

COMMONWEALTH OF VIRGINIA

Complainant

vs

LARRY DALE PATTY

Defendant

MOTION TO SUPPRESS EVIDENCE

COMES NOW, the Defendant, LARRY D. PATTY, and respectfully moves the Court to suppress the evidence in the above-captioned cause and as grounds therefore respectfully states:

1. That at the time of the arrest in the above-captioned cause on the 11th day of February, 1975, the police who made the arrest on the charge of possession of Marijuana with intent to distribute, did not have sufficient probable cause for the arrest on the charge of possession with intent to distribute Marijuana and, therefore, any evidence obtained as a direct result of the unlawful arrest should be suppressed by the Court.

2. That the search of the vehicle which took place nearly concurrently with Defendant's arrest was not necessary for the officer's protection, was not an inventory search, and was clearly an illegal search of the automobile.

3. That the police officers had more than ample time to request and obtain a valid search warrant for the vehicle in

question and should have done so instead of prying open the trunk lid with a crow bar nearly concurrently with the time of arrest.

LARRY D. PATTY

N.B. Henceforth the designation TM will refer to the transcript of the Motion to Suppress heard on September 17th, 1975, the designation TT to the trial transcript which was heard on September 22, 1975, and the designation TS will refer to the sentencing transcript which was heard on May 25, 1976.

CIRCUIT COURT'S RULING ON MOTION TO SUPPRESS

T.M. pp. 58

8. The Court will deny the Motion to Suppress. Counsel may note objections to that. This case is set for trial —

APPELLANT'S MOTION TO SET ASIDE THE VERDICT

DENIED May 25, 1976

VIRGINIA:
IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CRIMINAL NO. _____

COMMONWEALTH OF VIRGINIA

Complaint

vs

LARRY DALE PATTY

Defendant

MOTION TO SET ASIDE VERDICT

COMES NOW, the Defendant, LARRY DALE PATTY, and moves the Court to set aside the verdict of guilty of possession with intent to distribute a controlled drug (Marijuana), said verdict pronounced on the 22nd day of September, 1975, and as grounds therefore respectfully states:

1. That there was neither probable cause for arrest nor porbable cause to obtain a search warrat based on the facts known to the police.

2. Assuming that there was enough probable cause for a search, the police officers should have gotten a search warrant to search the car.

3. The Court should not have allowed the marijuana to come into evidence because of the lack of expert testimony regarding the proper identification of the marijuana.

4. That Defendant's theory of the case was consistent with his innocence and, therefore, he should have been found not guilty.

5. Based on the evidence presented by the Commonwealth, there was no constructive possession of the marijuana by the Defendant, Larry Dale Patty.

WHEREFORE, your Defendant, Larry Dale Patty, respectfully moves the Court to set aside the verdict of guilty previously entered against him and submits the attached Memorandum of Law in support of this Motion.

LARRY DALE PATTY

CIRCUIT COURT'S RULING ON THE MOTION TO SET ASIDE VERDICT

T.S. pp. 22-23

18. At the time of trial, the Court was somewhat critical of the police handling of this case. The Court at that same time denied the motions by counsel, the same motions before the court to date. On the motion to set aside the verdict on the various grounds such as the probable cause and the lack of a search warrant and the identity of the substance and so forth, the Court will deny the Motion to Set Aside the Verdict. And counsel may note objection and exception to the ruling of the Court.

EXCERPTS FROM TRANSCRIPT OF THE TRIAL IN THE PRINCE WILLIAM CIRCUIT COURT

STATEMENT OF MR. P. H. HARRINGTON, JR.

T.M. pp. 6-7

8. Mr. Green, Jr. called the police. The police will testify they received a call sometime between 2 and 2:30 saying there was suspected marijuana in a trunk at the Mobil gas station.

Investigator Fisher, Investigator Dean responded to the call and Investigator Dean was in the area about 2:30 and they arrived sometime before 3:00 o'clock in this particular day of the offense, before 3:00 o'clock in the afternoon.

* * * * *

20. Then, after checking with the three people at the gas station, Investigator Fisher, I think by this time maybe Sgt. Russell and Investigator Bennett pulled up and got another policeman to have a stake-out of the car and the gas station to see who came to pick up or if anybody came to pick up the car.

I believe there are about seven policemen in on the stake-out altogether in different areas, some in the gas station, some in cars, I think one guy was parked, a couple parked in a nearby area, a block or two away and they could come quickly.

TESTIMONY OF INVESTIGATOR JAMES D. FISHER

T. M. pp. 22-23

23. I believe you testified earlier at another hearing, of course, that it had taken you anywhere from one, usually a minimum of one hour and maximum of maybe six hours to get a search warrant in your experience of all of the search warrants you have got?

A. I believe I said one to eight hours.

Q. If there were any emergency situation to get a search warrant, what do you think the fastest you could get a search warrant would be?

A. Written search warrant?

Q. Yes, it has to be written, instead of having it typed up, a handwritten — written in by hand, what do you think the shortest period of time would be?

A. I believe an hour.

Q An hour would be an emergency situation?

A. Yes, sir.

Q. You didn't testify to that earlier, though, did you?

A. I don't believe anybody asked me that question.

* * * * *

TESTIMONY OF SGT. SAMUEL B. RUSSELL

T.M. pp 26-27

12. Now, when you were there, did you have any discussion with Investigator Dean about whether or not a search warrant — you should get a search warrant?

A. We had — Sgt. Dean and myself had a lot of discussions.

Q. As far as pinning it down as to whether to get a search warrant or not, not as such, due to the fact that the information I was getting — I talked to Officer Fisher on the phone once and most of the information I got was from Investigator Bennet who I had relaying mesages from myself to Officer Fisher and back.

Sgt. Dean and I spent considerable amount of time together that evening, sometimes for a few minutes he would be in the car with me and sometimes separately, it would be separate ways.

We had a lot of discussions, but as far as such as to calling the shot on getting a search warrant, we couldn't call the shot. I was getting more information fed to me as time went on, you might say.

Q. Did you have some discussions, somebody did talk that night about whether or not a search warrant — sometime during that period of time, somebody had some conversation with you, isn't that correct?

A. I had some conversation. The nature of my conversation was due to the fact I had reason to believe that they had the car under surveilance as well as we did.

There was never a final decision made until the minute of the arrest.

* * * * *

T.M. P. 39

Q. You weren't about to let anybody drive off in the car.

A. No, sir, no way.

TESTIMONY OF INVESTIGATOR RALPH BENNETT

T.T. pp. 40-41

Q. All right, What did you notice the two individuals do at that time?

A. Two adult males exited the car with the Maryland tags and walked towards the suspect vehicles opening the right front or the driver's side door. And one person got in behind the wheel and the other person was standing outside of the car between the open door and the car itself.

Q. What did you do at that time?

A. At that time, I gave a prearranged signal that the suspect had arrived, and for the arrest party to move in. And at that time, I drove the old Valiant to a point approximately 35 to 40 feet from the suspect vehicle and leveled a shotgun toward the people, at the suspect vehicle, instructing them that I was a police officer and to stay where they were.

Q. Any other officers arrive at that time?

A. Several other police officers converged on the area.

Q. Did you see who made the arrest of these two individuals?

A. I do not know. I did not know at that time who told the individuals they were under arrest. I was too far away for normal conversation to be heard.

Q. Did there come a time that the trunk of the car was opened?

A. There was a time, yes, sir.

* * * * *

T.T. p. 48

1. You knew the car wouldn't start; is that right?

A. There had been some conversation earlier. The station's policy of removing a coil – this is due to the people – they had an idea that the people would come and take the car without paying the bill.

6. You knew it was disabled, didn't you?

A. I knew it would not start, yes.

TESTIMONY OF HAROLD RONALD GREEN, SR.

T.T. p. 19

8. Now, I believe your former testimony was also that the car was disabled about 3:30 P.M.; is that correct?

A. Yes, sir.

11. Did you disable it or did Officer Bennett disable it?

A. Neither one.

13. Who did that?

A. My son.

SENTENCING STATEMENT BY THE HONORABLE BURCH MILLSAP

THE COURT: Mr. Patty, you have maintained your innocence throughout the trial of this. Of course, you have to do. We do have several important questions in this case. Your counsel has raised all of the issues that would protect you in an appeal of the case. Because of the important issues the Court has been faced with in reference to the search warrant and probable cause and so forth the Court would strongly urge that you give serious consideration for an appeal of the case to the Supreme Court of Virginia because it's not the intent of the Court at any time for the Defendant to spend one day in jail if the Defendant is innocent of the charge.

Having been found guilty by the Court the Court would sentence you to seven years in the State penitentiary. The Court would suspend five years of the sentence and place you upon probation for a period of two years.

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 761249

LARRY DALE PATTY

vs

COMMONWEALTH OF VIRGINIA

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Defendant, LARRY DALE PATTY, files this his Notice of Appeal from the judgment rendered by the Virginia Supreme Court on June 10, 1977, said judgment finding him guilty of possession with intent to distribute the controlled drug, marijuana. The Defendant, LARRY DALE PATTY, will petition the United States Supreme Court to grant him a Writ of Certiorari pursuant to Title 28 United States Code §1257 (3).

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 1977, three copies of this Notice of Appeal were served upon the Respondent by depositing the same in the United States Mail, first class, postage prepaid, in envelopes addressed to the Honorable Anthony F. Troy, Attorney General, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia 23219 and to Paul Ebert, Commonwealth Attorney, 9304 Peabody Street, Manassas, Virginia 22110. I further certify that all parties required to be served have been served, pursuant to Rule 33 of the Rules of the Supreme Court of the United States.

/s/ P. H. HARRINGTON, JR.
Farley, Harrington & Stickels, Ltd.
10560 Main Street, Suite 211
Fairfax, Virginia 22030

Attorney for the Petitioner